WESLEY CORP.

IBLA 93-215 Decided September 2, 1994

Appeal from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management, ordering payment of damages for mineral trespass. NV-050-4-636.

Affirmed.

1. Materials Act--Trespass: Generally

Removal of mineral material without a sales contract or permit issued under the Materials Act and Departmental regulations is an act of trespass. When trespass damages are based on the "value in place" that would have been paid had the mineral material been removed under contract, the assessment of trespass damages is in accord with rulings governing damages for unintentional trespass.

APPEARANCES: John H. Wesley, President, Wesley Corporation, Las Vegas Nevada.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Wesley Corporation (Wesley) has appealed a January 20, 1993, decision issued by the Area Manager, Stateline Resource Area Office, Las Vegas, Nevada, Bureau of Land Management (BLM), directing Wesley to pay trespass damages for removing sand and gravel from the North Jean Lake Community Pit, Clark County, Nevada, without benefit of a mineral materials sales contract.

On September 9, 1992, Wesley entered into a minerals materials sales contract pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1988). The contract was for the sale of approximately 1,000 cubic yards of sand and gravel from the North Jean Lake Community Pit for $0.86 per cubic yard, and had a September 23, 1992, expiration date.

Between 7:25 a.m. and 12:15 p.m. on December 8, 1992, BLM inspector Kuntz observed Wesley remove 22 truckloads (330 cubic yards) of sand and gravel from the pit. That afternoon Wesley obtained a new mineral materials contract providing for purchase of 500 cubic yards of sand and gravel at $0.86 per cubic yard.

BLM issued a notice citing Wesley for trespass on December 14, 1992. The notice also directed Wesley to provide copies of sales and haul records for material removed from the North Jean Lake Community Pit during the
period from September 9 through December 9, 1992. Wesley received the notice on December 21, 1992, and on the same day it submitted its records for the specified period together with a letter stating that a BLM official had granted oral permission to remove materials on December 7, 1992, and directed Wesley to obtain a sales contract as soon as possible. Wesley explained that its submittal of a contract application was delayed until the afternoon of the 8th by the need to submit a certified check which it could not obtain until late that morning. Wesley's haul slips show that 22 truckloads of sand and gravel were removed on December 7, 1992, and 26 truckloads were removed on December 8.

BLM's January 20, 1993, decision noted BLM's acceptance of the haul slips and information submitted by Wesley in response to the trespass notice, and cited Wesley for a violation of sections 302 and 310 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732, 1740 (1988), and 43 CFR 9239.0-7. Based upon the December 8, 1992, inspector's tabulation and Wesley's haul slips, Wesley was cited for removing 704 cubic yards of sand and gravel in trespass. BLM assessed $605.44 in trespass damages, based on a value of $0.86 per cubic yard.

In its statement of reasons on appeal, Wesley does not deny removing sand and gravel without a mineral materials sales contract. Wesley explains that its personnel were faced with an urgency of "next day" delivery schedules, but could not obtain the cashier's check that must be submitted before execution of a mineral materials contract because the banks did not open until mid-morning. Wesley explains that as a small operator it cannot afford to enter into a contract for the purchase of a large quantity of mineral material and lose the amount paid for materials not removed when the contract expires.

[1] Mineral material trespass is prohibited by 43 U.S.C. §§ 1732, 1740 (1988), and by 43 CFR 3603.1 which states:

> Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title).

In turn, 43 CFR 9239.0-7 provides:

> The extraction, severance, injury, or removal of * * * mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution of such unlawful acts.

It can be seen that removal of mineral materials without a sales contract or permit is an act of trespass. Richard Connie Nielson v. BLM, 125 IBLA 353, 363 (1993); Frehner Construction Co., 124 IBLA 310 (1992); Curtis Sand & Gravel Co., 95 IBLA 144, 161, 94 I.D. 1, 10 (1987). When it assessed trespass damages at the rate of $0.86 per cubic yard BLM valued the material at the rate stated in the contracts with Wesley just before and after the period of trespass. By using this rate, BLM sought to obtain the "value in place" that Wesley would have paid had it removed the materials under contract. This assessment is in accord with Board rulings governing damages for unintentional trespass. See Richard Connie Nielson, supra at 367; Harney Rock & Paving Co., 91 IBLA 278, 93 I.D. 179 (1986).

Wesley does not deny that it removed sand and gravel from the North Jean Lake Community Pit without the benefit of a contract on December 7 and December 8, 1992, and it does not dispute either the volume of materials removed in trespass or the assessment. We conclude that the assessment is correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge